for conversion. In any case it should also be noticed that Buhagiar J in *Rubber Industry (Replanting) Board* v *Hongkong and Shanghai Banking Corp*[1] had pointed out that 'there are several cases where an action has been successfully maintained by the payee who never was in actual possession of a cheque or other instrument because although such cheque or instrument was despatched it never reached the payee, eg *Commissioner of Taxation* v *English, Scottish and Australian Bank Ltd* [1965] 1 Lloyd's Rep 525; *Norman* v *Ricketts* (1886-7) 3 TLR 182; *Thairlwall* v *The Great Northern Ry Co* [1910] 2 KB 509'.

In the circumstances of this case we agreed with Mr Sri Ram that the question whether there had been delivery of the cheques did not arise in view of what has been pleaded in the statement of defence and the submission of defence counsel in the court below. Encik Mohd Ismail Shariff informed us that he did not appear for the defendant in the court below but he might have noticed that the learned judge in his judgment, which was written in Bahasa Malaysia, did point out that it was clear that the plaintiff was the owner of the cheques concerned or at least had a right to the immediate possession because the defendant himself admitted that the cheques were issued by GP Securities (Sdn) and Syarikat Leong Sdn Bhd for and in the plaintiff's name as the payee and who was meant to have the proceeds and not others. Therefore, apart from the pleadings and the submission of the defence in the court below, there was the finding of the learned judge that the plaintiff had an immediate right to possess the cheques in question. We were therefore of the view that the plaintiff in this case was the true owner of the cheques and had a sufficient interest in them to enable him to bring an action for damages for conversion or for negligence. He was the true owner and had an immediate right of possession of the cheques for which there was evidence that he had provided consideration, ie by delivery of his scripts to the two firms of stock brokers in exchange for the cheques. We would also point out that in view of the learned judge's finding of negligence on the part of the defendant for which there was evidence adduced, the defendant as the collecting banker was not entitled to the protection of s 85 of the Act.

As regards the other lines of argument advanced by the defence, we note that the learned judge in his judgment had referred to the evidence of the plaintiff's daughter (PW8) who said that the signatures on the cheques in question were not those of her father. She said that she had often seen her father writing his signature on cheques and that her father had never made endorsements on the back of the cheques paid to him because he usually used his rubber stamp. The plaintiff had tendered exhibits showing his specimen signatures and the learned judge has also stated in his judgment that he had the opportunity of comparing the signatures on all the 56 cheques concerned with the plaintiff's specimen signatures on the exhibits produced (exhs P3, P6 and P7) and he had found as a fact that there was a vast difference between the signatures on the alleged endorsements and the specimen signatures of the plaintiff. He had therefore also found that the signatures on the back of the 56 cheques were not those of the plaintiff. In view of that finding of fact by the learned judge that the endorsement on the cheques was not made by the plaintiff, it was clear that the plaintiff had not negotiated the cheques by endorsing them. As the acceptance or subsequent negotiation of the cheques in this case was affected by circumstances in the nature of fraud, the onus probandi was on the defence to show that subsequent to the alleged fraud the said Ong Swee Hock had given value in good faith for the said cheques. There was no such evidence adduced by the defence.

As there were no merits in the appeal, we therefore dismissed it with costs and ordered that the deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Zain & Co; Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Eeswari Visuvalingam v Government of Malaysia

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 500 OF 1988
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA), LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND MOHAMED YUSOFF SCJJ
7 NOVEMBER 1989

Public Servants — Pensions — Husband married wife according to Hindu rites — Husband subsequently embraced Islam — Wife remained a Hindu — No application for divorce made by the wife — Husband a pensioner who later died — Whether wife a widow and dependant and entitled to derivative pension — Pensions Regulations 1980, reg 2 — Pensions Adjustment (Amendment) Act 1983, s 4 — Pensions Act 1980, s 15

In this case the appellant sought a declaration that she was a dependant as defined in s 4 of the Pensions Adjustment (Amendment) Act 1983 and also a declaration that she was entitled to a derivative pension under s 15 of the Pensions Act 1980. The appellant was married according to Hindu rites and the marriage was registered. Her husband subsequently embraced Islam. He was a pensioner under the Pensions Act 1980 and later died. The appellant had not sought a divorce from him under the Law Reform (Marriage and Divorce Act) 1976. The High Court held that the appellant was not entitled to the derivative pension. The appellant appealed.

Held, allowing the appeal:

Section 15(1)(a) of the Pensions Act 1980 provides for derivative pension to be given to persons prescribed in the Pensions Regulations 1980. As the appellant came within the definition of 'widow' in the Pensions Regulations 1980 as 'being the surviving

spouse of a deceased officer whose marriage is recognized in Malaysia as a valid marriage under any written law, religion, custom or usage', she is therefore a dependant and entitled to the derivative pension.

Cases referred to

1 *Farooq Leivers* v *Adelaide Bridget Mary* PLD 1958 (WP) Lahore 431 (refd)
2 *Che Omar bin Che Soh* v *PP* [1988] 2 MLJ 55 (refd)

Legislation referred to

Pensions Act 1980 s 15
Pensions Adjustment (Amendment) Act 1983 s 2
Pensions Regulations 1980 reg 2

Appeal from: Civil Suit No P21-529-86 (High Court, Kuala Lumpur)

Izabella de Silva for the appellant.
KN Segara (Senior Federal Counsel) (*Hassan bin Lah* (Federal Counsel) with him) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant in her statement of claim dated 30 June 1986 sought a declaration from the High Court, Kuala Lumpur that she was a 'dependant' as defined in s 4 of the Pensions Adjustment (Amendment) Act 1983 and also a declaration that she was entitled to a derivative pension under s 15 of the Pensions Act 1980.

In the statement of defence, the respondent contended that the appellant was not a 'widow' under the pension laws as claimed because 'she did not convert to Islam within the three months of her husband's conversion'. This defence was obviously based on a fatwa as given in the affidavit of the Mufti, Wilayah Persekutuan in which the Mufti stated that:

> I hereby state that according to Muslim law, if a married man embraces Islam but his wife fails to convert to Islam the marriage in question ceases to subsist on the date of the husband's conversion.

At the commencement of the hearing in the High Court, the parties arrived at the following agreed facts:

(1) The appellant married Visuvalingam s/o Ponniah according to Hindu rites and the said marriage was registered on 15 November 1950.
(2) Visuvalingam s/o Ponniah embraced Islam on 16 July 1978 and adopted the name of Abd Hamid bin Abdullah.
(3) Visuvalingam s/o Ponniah was a pensioner under the Pensions Act 1980.
(4) Visuvalingam s/o Ponniah died on 7 January 1985.
(5) By a letter of 7 March 1985, the plaintiff applied to the Public Services Department for derivative pension.
(6) On 16 April 1986, the Pensions Department rejected the plaintiff's application on the same grounds as stated in the statement of defence.

The registration of the said marriage on 15 November 1950 was under the Hindu Marriage Registration Enactment (Cap 112). This enactment was repealed by the Registration of Marriages Ordinance 1952 but s 18 of the Ordinance saved the registration.

Section 4 of the Law Reform (Marriage and Divorce) Act 1976 provides that nothing in that Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date and such marriage, if valid under that law, religion, custom or usage shall be deemed to be registered under the Act. That Act also provides that every such marriage shall continue until dissolved by the death of one of the parties or by order of a court of competent jurisdiction or by a decree of nullity made by a court of competent jurisdiction.

The issue before the High Court was, as stated in the summons-in-chambers dated 8 June 1987, for the court to deal with the question under O 33 of the Rules of the High Court 1980 'whether the non-conversion of the plaintiff from her religion to that of Islam within three months of the conversion to Islam of her spouse dissolves the marriage between the plaintiff and her husband and thereafter disentitles her from being a 'dependant' within the definition contained in s 4 of the Pensions Adjustment (Amendment) Act 1983 and to a pension under s 15 of the Pensions Act 1980'.

First, we must make it clear that we are not dealing with the question whether the appellant was entitled to any part of the estate of a deceased Muslim. We are only dealing with the question whether, following the question asked, she is entitled to a derivative pension under a particular law on pensions.

The word 'dependant' is defined in s 4 of the Pensions Adjustment Act 1980 as follows:

> 'dependant' means a widow, widower, child, mother or father of a deceased officer.

The word 'widow' is defined in the Pensions Regulations 1980 as follows:

> 'widow' or 'widower' means the surviving spouse of a deceased officer whose marriage *is recognized in Malaysia as a valid marriage under any written law, religion, custom or usage.* (Emphasis provided.)

Section 15(1)(a) of the Pensions Act 1980 provides for derivative pension to persons prescribed in the Regulations.

The answer to the question posed is therefore straightforward. There is no evidence that the marriage has been dissolved. The appellant is therefore suing as a widow as defined under the pension laws. The fact that her husband had converted to Islam does not in our view affect the appellant's rights under the Pensions Act 1980 and the 1980 Regulations.

In *Farooq Leivers* v *Adelaide Bridget Mary*[1] the plaintiff, a non-Muslim converted to Islam, asked the defen-

dant to study the Islamic religion and embrace Islam but she refused. The plaintiff, realizing that there was no chance of a reconciliation, divorced the defendant by pronouncing the Islamic formula of talak. The learned judge there realized that as the plaintiff had embraced Islam he at once became subject to Muslim personal and religious laws. But the more difficult question in such cases was what was the effect of the conversion on other persons who have some rights vested in them before the conversion. In that case the learned judge held that:

> On the one hand under the Muslim law, a Christian husband, on his conversion to Islam, is authorized to give talak to his Christian wife by pronouncing the formula of talak, but on the other hand, the courts in Pakistan cannot recognize such a talak in view of the provisions of the Divorce Act 1869 and other existing laws. In such a conflict of the personal law of the parties to the suit, there does not appear to be any justification to prefer the personal law of the plaintiff to the personal law of the respondent.

In our case here, the law applicable to the appellant had always been her own personal laws and the civil laws of the country. See also *Che Omar bin Che Soh* v *PP*.[2]

Since the appellant's marriage remained valid under the civil law at the time of the death of Visuvalingam s/o Ponniah, she is therefore a dependant under the pension laws and is entitled to a derivative pension.

The Pensions Act 1980 and the 1980 Regulations are civil laws of general application and if a person is entitled under the Act, that person is entitled, regardless of whether he is a Muslim or a non-Muslim. For the purpose of the pension laws, the appellant is certainly a widow (or one of the widows) of the deceased.

Mr Segara, Senior Federal Counsel, who appeared for the respondent had elected not to make any submission before us and relied solely on the decision of the learned trial judge.

We accordingly allowed the appeal and ordered that the appellant be entitled to the declarations sought. After hearing arguments on costs we decided not to make any order as to costs and that parties shall bear their own costs.

Appeal allowed.

Solicitors: *Chooi & Co.*

Reported by *Prof Ahmad Ibrahim*

Ooi Sim Yim v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-15-89
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND AJAIB SINGH SCJJ
18 OCTOBER 1989

Criminal Procedure — Sentence — Charges under Firearms (Increased Penalties) Act 1971 for possession of firearm and under the Arms Act 1960 for possession of ammunition — Whether sentences should be consecutive or concurrent — Second charge subsidiary to first charge — Sentences should be concurrent — Whether judge of High Court can substitute judgment after it was recorded and delivered — Criminal Procedure Code (FMS Cap 6), ss 278, 282(d) & 292(i)

The appellant had pleaded guilty to two charges, the first for possession of a firearm and the second for possession of ammunition. The learned judicial commissioner sentenced the appellant to ten years' imprisonment and six strokes of whipping on the first charge and another three years on the second charge and ordered that 'both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest'. [See [1989] 3 MLJ 120.] About two and a half months after the disposal of the case the learned judicial commissioner issued a corrigenda to substitute the original order with a new one which had the effect of making both sentences run consecutively, ie the appellant was to serve a total of 13 years' imprisonment to take effect from the date of his arrest. The appellant appealed against the said order, contending that the two sentences should run concurrently.

Held, allowing the appeal against consecutive imprisonment:

(1) Since both charges in this case had arisen out of one and the same transaction, it was not unreasonable to conclude that the second charge was really subsidiary to the first charge. Thus it was appropriate that the two sentences should run concurrently rather than consecutively.

(2) Section 278 of the Criminal Procedure Code (FMS Cap 6) did not empower the learned judicial commissioner to substitute his judgment two and a half months after it was recorded and delivered. As the judgment he gave was equivocal and capable of two interpretations, the basic principle of criminal justice should apply in that the construction more favourable to the appellant should be adopted rather than the substituted order subsequently made by the learned judicial commissioner.

Cases referred to

1 *Cheng Kee Huat & Anor* v *PP* [1948] MLJ 53 (follid)
2 *Hyder* v *Rex* [1949] MLJ 121 (follid)
3 *PP* v *Teh Ah Cheng* [1976] 2 MLJ 186 (follid)
4 *PP* v *Chung Kwong Huah* [1981] 1 MLJ 316 (follid)
5 *Lee Chow Meng* v *PP* [1976] 1 MLJ 287 (distd)
6 *PP* v *Heng You Nang* [1949] MLJ 285 (follid)
7 *In re Gibbons* 1LR 14 Cal 42 (follid)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 278, 282(d), 292(i)

Appeal from: Criminal Trial No 14 of 1984 (High Court, Kuala Lumpur)

Manjeet Singh Dhillon for the appellant.
Abdul Hamid bin Mohamad (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult